Decision **PROPOSED DECISION OF ALJ MacDONALD (Mailed 8/14/18)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of PACIFICORP (U 901 E) for Authority to Sell Certain Mining Assets in Accordance with Public Utilities Code Section 851.	Application 15-09-007

DECISION ADOPTING ALL-PARTY SETTLEMENT, AS MODIFIED AND GRANTING PACIFICORP APPROVAL TO SELL CERTAIN MINING ASSETS UNDER SECTION 851

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DECISION ADOPTING ALL-PARTY SETTLEMENT, AS MODIFIED AND GRANTING PACIFICORP APPROVAL TO SELL CERTAIN MINING ASSETS UNDER SECTION 851

Summary

This decision adopts, with certain modifications, the all-party settlement of PacifiCorp, doing business as Pacific Power (PacifiCorp), the Office of Ratepayer Advocates, and the Sierra Club. The settlement agreement provides that, given the totality of circumstances, the sale of certain mining assets is in the public interest. It further provides that PacifiCorp will file a Tier 1 Advice Letter if it enters into any new coal supply agreements for the Hunter or Huntington Plants with a term of five years or more. The settlement agreement also contemplates a donation of $30,000 to an environmental group in acknowledgement that it closed the sale of mining assets without approval of the California Public Utilities Commission (Commission).

This Commission finds that the settlement agreement provision for a donation of $30,000 to an environmental organization, while admirable, is not consistent with the law. PacifiCorp chose to close the sale of mining assets without obtaining Commission authorization. As a result, this decision imposes a penalty of $30,000 for violation of Public Utilities Code Section 851 and grants prospective approval for PacifiCorp's sale of certain mining assets. We deny PacifiCorp's request for retroactive approval of the sale.

1. Factual Background

On June 15, 2015, PacifiCorp d/b/a/ Pacific Power (PacifiCorp) sold the following: (1) the Central Warehouse[1] and other remainder assets; (2) the Preparation Plant[2] and related assets; and (3) the Trail Mountain Mine[3] and related assets (collectively referred to as the Mining Assets).[4] The Mining Assets had a net book value of $305,000 on a California-allocated basis.[5] The total value of the Mining Assets on a total-company wide basis was in excess of $20 million.

The sale of the Mining Assets was part of a much larger transaction between Pacific Power d.b.a. PacifiCorp (PacifiCorp) and Bowie Resource Partners, LLC (Bowie) that also included (1) the execution of Coal Supply Agreements (CSAs) requiring Bowie to supply coal to PacifiCorp's Hunter and Huntington plants; (2) transfer of the Fossil Rock coal leases from PacifiCorp to Bowie; (3) closure of the Deer Creek Mine and (4) PacifiCorp's settlement of the retiree pension and medical obligations of Energy West union participants previously employed at the Deer Creek Mine.[6]

Although PacifiCorp initially sought California Public Utilities Commission (Commission) approval for the sale of Mining Assets through the

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[1] Located near the Hunter Plant in Castle Dale, Utah and used to store equipment and supply inventories for nearby facilities including the Preparation Plant and Deer Creek Mine.

[2] This facility, located south of and adjacent to the Hunter plant, was used to blend coal for that plant.

[3] A mostly depleted coal mine located near Huntington in Emery County, Utah. The plant ceased operations in 2001 but had not been reclaimed or remediated at the time of transfer to Bowie. Trail Mountain is adjacent to Fossil Rock Reserves and could be used to access those reserves.

[4] Settlement Agreement at 1-3.

[5] Settlement Agreement at 3.

[6] Settlement Agreement at 4.

Advice Letter process and this application, PacifiCorp completed the transaction prior to the Commission making a determination under Public Utilities (Pub. Util.) Code Section (§) 851.

2. Procedural Background

PacifiCorp filed the instant application after Advice Letter (AL) 513-E was rejected. On December 15, 2014, PacifiCorp submitted AL 513-E seeking approval from the Commission, in accordance with Pub. Util. Code § 851, to sell certain mining assets to Bowie. AL 513-E stated that the portion of the Mining Assets allocated to California ratepayers had a book value of only $305,000, although the total value of the Mining Assets exceeded $20 million. Based on this book value, PacifiCorp reasoned that the advice letter process was the appropriate procedural forum.

The Public Advocates Office of the California Public Utilities Commission (Cal PA)[7] and the Sierra Club protested AL 513-E alleging, among other things, that the sale of the Mining Assets is an integral part of a larger transaction to close the Deer Creek Mine.[8] Therefore, Cal PA and Sierra Club contended that an application, rather than an advice letter, was required because the value of the

[7] During the pendency of this proceeding the Office of Ratepayer Advocates was renamed the Public Advocates Office of the Public Utilities Commission pursuant to Senate Bill 854, which was approved by the Governor on June 27, 2018.

[8] The closure of the Deer Creek Mine includes four major elements: (1) the permanent closure of the Deer Creek Mine; (2) withdrawal from the United Mine Workers of America 1974 Pension Trust; (3) the sale of certain assets including the Mining Assets; and (4) the execution of a replacement CSA for the Huntington generating plant. PacifiCorp also settled its retiree medical obligation related to Energy West Union participants. The sale also includes the sale of assets of Fossil Rock Fuels, LLC, a wholly-owned subsidiary of PacifiCorp. PacifiCorp states that the Fossil Rock Fuels assets are not in California rates and are thus not addressed in PacifiCorp's application.

total sale exceeded the $5 million threshold established by Pub. Util. Code § 851. In addition, Cal PA and Sierra Club argued that Commission approval would require review under the California Environmental Quality Act[9] (CEQA).

During the pendency of AL 513-E, PacifiCorp advised the Commission that it needed to act on PacifiCorp's advice letter filing by the May 31, 2015 contractual closing date.[10] On May 2, 2015, the Commission's Energy Division (ED) notified PacifiCorp that it would not issue a final resolution on AL 513-E before the end of May. On June 5, 2015, PacifiCorp closed the transaction prior to receiving Commission approval. On July 24, 2015, the Commission rejected AL 513-E without prejudice and directed PacifiCorp to file the instant application to allow the Commission to consider the transaction.

On September 18, 2015, PacifiCorp filed the instant Application (A.) 15-09-007 seeking retroactive approval for the sale of the Mining Assets pursuant to Pub. Util. Code § 851. PacifiCorp argued that the sale of the Mining Assets was not a project[11] that required CEQA review because the sale was merely a transfer of ownership. Alternatively, PacifiCorp argued that the sale was categorically exempt from CEQA under the existing facilities[12] and common sense exemptions.[13]

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[9] The California Environmental Quality Act codified at California Public Resources (Pub. Res.) Code § 21000 et seq.

[10] The Energy Division (ED) began reviewing AL 513-E, but suspended its review from January 16, 2015 through May 15, 2015.

[11] Pub. Res. Code 21065; Cal. Code Regs. Tit. 14, §15378(a).

[12] Cal. Code Regs., tit. 14, § 15301.

[13] *Id*. at 15061(b)(3).

On October 22, 2015, Sierra Club protested PacifiCorp's application. Sierra Club argues that PacifiCorp violated Pub. Util. Code § 851 by completing the transaction without Commission approval. Sierra Club defines the transaction as the interdependent components of the Deer Creek transaction that results in the closure of the Deer Creek mine, the execution of new long term coal supply contracts for the Huntington coal plant, elimination of obligations to union workers it is laying off, the transfer of various mining assets, and the leasing of the currently undeveloped Fossil Rock mine. Sierra Club further argued that the transaction would likely harm California ratepayers, result in more coal mining; would prolong the life of the Huntington coal plant; lead to increased contamination around the Huntington plant; and lead to increased shipping and export of coal from Utah to foreign countries through California ports.

CAL PA joined as a party to the proceeding on May 17, 2016. Cal PA expressed concern that the larger transaction would have a significant adverse impact on the environment. Further, Cal PA argued that the CSA's take-or-pay provisions could negatively impact PacifiCorp's California customers.

On February 8, 2016, the Assigned Administrative Law Judge (Judge) held a prehearing conference (PHC). Following the PHC, the assigned Commissioner and Judge issued a joint Scoping Ruling on May 31, 2016 which identified issues to be considered, set the procedural schedule, and directed the parties to file supplemental briefs on the applicability of CEQA. On June 17, 2016, PacifiCorp and Sierra Club timely filed briefs on the applicability of CEQA.

On July 11, 2016, Cal PA and Sierra Club submitted prepared direct testimony; PacifiCorp submitted supplemental direct testimony, as its original testimony submitted in conjunction with A.15-09-007 addressed only the sale of the Mining Assets. The Scoping Ruling determined that the larger transaction

might fall within the scope of the proceeding. PacifiCorp submitted rebuttal testimony on September 12, 2016.

On October 4, 2016, PacifiCorp moved for confidential treatment of certain information contained within Exhibit PAC/400 (the Rebuttal Testimony of Cindy A. Crane), supporting Exhibit PAC/402 (Preliminary PacifiCorp Coal Supply Plan), and PAC/500(rebuttal testimony of Seth Schwartz).[14] Following the submission of testimony, the parties began settlement discussions.

The parties held a settlement conference on November 1, 2016. On December 8, 2016, the parties notified the Judge that an all-party settlement had been reached in principle. The parties executed the agreement in late December and on February 6, 2017, jointly moved for Adoption of the Settlement Agreement (All-Party Settlement). The All-Party Settlement was attached to the motion. The Joint Parties simultaneously sought confidential treatment of certain identified information contained in testimony submitted in connection with this application.

3. Jurisdiction

Pub. Util. Code § 701 states that "The Commission may supervise and regulate every public utility in the State and may do all things…which are necessary and convenient in the exercise of such power and jurisdiction." Further, Pub. Util. Code § 851 provides, in relevant part:

> A public utility [...] shall not sell, lease, assign, mortgage, or otherwise dispose of, or encumber the whole or any part, its [...] property necessary or useful in the performance of its duties to the public [...] without first having secured an order from the

[14] This rebuttal testimony was served on parties on September 12, 2016 and included the required statement of confidentiality under Pub. Util. Code § 583 and General Order (GO) 66-C.

> commission authorizing it to do so…. Every sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the advice letter and approval from the commission authorizing it is void.

PacifiCorp is a public utility doing business in the state of California seeking authority to transfer ownership of these Mining Assets.

4. CEQA

Prior to addressing the All-Party Settlement, we will first address the issue of whether the sale of Mining Assets is subject to CEQA. Parties excluded this issue from the All-Party Settlement and stipulated that nothing in the All-Party Settlement should be construed as an agreement among the parties as to the applicability of CEQA.

4.1. Party Positions on CEQA

PacifiCorp argues that the scope of CEQA review should be limited to the sale of the Mining Assets, which is simply the transfer of property that is "being used for the same purpose and in the same manner, as before the sale," and involves no construction so it has no potential for resulting in a direct or reasonably foreseeable indirect physical change to the environment. As a result, PacifiCorp contends the sale is not a "project" under CEQA, meaning that Rule 2.4(b) does not apply and the Commission is not required to perform any level of CEQA review prior to acting on PacifiCorp's application under Section 851.[15] The activities that Sierra Club includes in its argument as within the scope of the project are, PacifiCorp argues, separate hypothetical activities for

[15] PacifiCorp CEQA Brief at 4-5, 13.

which review would be premature because of the lack of a "concrete development proposal" that would allow meaningful environmental analysis.[16]

PacifiCorp argues that even if the transaction triggered CEQA, the only impacts that may be considered from activities in Utah are those related to greenhouse gases.[17] It believes the activities and impacts alleged by Sierra Club are not regulated by the Commission and are not undertaken for the benefit of California ratepayers served by PacifiCorp.[18]

Lastly, PacifiCorp argues that even if CEQA were triggered, the sale of the Mining Assets would be exempt under the existing facilities exemption because the Mining Assets will be used in the same manner after the sale as they were prior to the sale.[19] It also claims the common sense exemption would apply because it can be seen with certainty that no significant adverse environmental effect could result from the sale both because there is no envisioned change in the use of the Mining Assets and because the remediation of the Trail Mountain Mine constitutes an environmental improvement.[20]

Sierra Club argues that the sale of Mining Assets is subject to CEQA.[21] Sierra Club contends that the Commission's required approval under Section 851 makes the Commission the Lead or Responsible Agency for a CEQA review to occur to inform the Commission of environmental impacts and costs before it

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[16] *Id*. at 5-6.

[17] *Id*. at 6-7.

[18] *Id*. at 7-11.

[19] *Id*. at 11-12.

[20] *Id*. at 12-13.

[21] Sierra Club CEQA Brief at 2, citing Pub. Res. Code §21065.

makes a decision.[22] In addition, Sierra Club claims that the relevant CEQA inquiry is not limited to the sale of the Mining Assets from PacifiCorp to Bowie. Instead, Sierra Club asserts that "the whole of the action" should include the larger transaction to close the Deer Creek Mine—including the execution of a coal supply agreement and the sale of Fossil Rock Fuels assets—as well as the apparent or logical long-term results made possible by the transaction, namely the extension of the life of the Huntington Power Plant, Bowie's eventual extraction of the coal at Fossil Rock, and Bowie's eventual transport of coal from Utah through California by rail for eventual export to Asia through the Port of Oakland.[23]

Sierra Club asserts that the transfer of the Mining Assets will cause a physical change to the environment because of the eventual reclamation of the Trail Mountain Mine and because it is reasonably foreseeable that the Mining Assets will be used to mine the Fossil Rock lease.[24] It believes the broad alleged plan to extract and transport coal is a foreseeable consequence of the sale of the Mining Assets because Bowie has made statements that it intends to develop Fossil Rock mining operations and eventually export coal to international markets. Sierra Club alleges that this is sufficient evidence to include Bowie's plans in a CEQA review with the sale of the Mining Assets because the "obvious" path for export will include shipping terminals in California.[25] It also

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[22] Sierra Club CEQA Brief at 2-3, 15-16 citing 14 Cal. Code Regs., §15051(b).

[23] *Id*. at 2-3 citing *Natural Resources Defense Council, Inc. v. Arcata Nat. Corp*. (1976) 59 Cal.App.3d 959, 969.

[24] *Id*. at 4-5.

[25] *Id*. at 7-10.

argues that the Huntington CSA (and associated impacts) is part of the same project as the sale of the Mining Assets because it is "conditioned upon PacifiCorp receiving Commission approval for the sale of the Mining Assets under Section 851.[26] None of these pieces and aspects of the potential "project," Sierra Club argues, falls under any CEQA exemption.[27]

Sierra Club lastly argues that at the very least, PacifiCorp must comply with Rules 2.4(a)[28] and (b) by supplying a Proponent's Environmental Assessment with its application, a requirement that PacifiCorp has readily met in the past.[29]

4.2. Discussion and Analysis

CEQA requires an environmental review be conducted anywhere a proposed activity undertaken by a public agency or subject to public agency discretionary approval may cause a direct or reasonably foreseeable indirect physical change to the environment. The CEQA Guidelines[30] prescribe a three-tier structure that ensures public agencies account for environmental consequences in their decision-making, but also gives them flexibility to comply

[26] *Id*. at 11-13.

[27] *Id*. at 14-19.

[28] California Public Utilities Commission Rules of Practice and Procedure hereafter referred to as "Rule."

[29] *Id*. at 14-15, 19.

[30] 14 CCR § 15000 et seq.

with CEQA without incurring the substantial costs of full review where it would be unwarranted.[31]

First, the agency must conduct a preliminary review to determine if the proposed activity is subject to CEQA. A "CEQA project" or a "project subject to CEQA" is any activity that (1) requires a public agency's discretionary approval and (2) may cause a direct or reasonably foreseeable indirect physical change to the environment.[32] If the proposed activity "will not result in a direct or reasonably foreseeable indirect physical change in the environment" or otherwise does not meet the definition of "project" in the CEQA Guidelines,[33] it "is not subject to CEQA" and no further CEQA review is required.[34]

Second, if the lead agency[35] determines that the activity constitutes a project subject to CEQA, that agency then evaluates whether the activity is nonetheless exempt from CEQA. A CEQA project may be exempt from CEQA review if it falls under any (1) statutory exemption,[36] (2) categorical exemption,[37]

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[31] *See*, *Muzzy Ranch Co. v. Solano County Airport Land Use Com.*, 41 Cal. 4th 372, 379-81; *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors*, 91 Cal. App. 4th 342, 369; *see also*, *Friends of the Sierra Railroad v. Tuolumne Park and Recreation District*, 147 Cal. App. 4th 643.

[32] Pub. Res. Code § 21065; 14 CCR § 15378(a); D.05-07-016 at 8.

[33] 14 CCR § 15378.

[34] 14 CCR § 15060; *Muzzy Ranch*, 41 Cal. 4th at 379–80.

[35] Where a project is to be carried out or approved by more than one public agency a Lead Agency must be designated (14 CCR § 15050). The lead agency shall be the public agency with the greatest responsibility for supervising or approving the project as a whole. (14 CCR § 15051).

[36] Pub. Resources Code, § 21080(b)(1), (2); 14 CCR §§ 15061(b)(1), 15260; *Muzzy Ranch,* 41 Cal. 4th at 380.

[37] The Legislature empowered the public resources agency to determine "classes of projects" that are presumed to be exempt because they do not have a significant effect on the

Footnote continued on next page

or (3) the "common sense" exemption.[38] If an exemption applies, "no further environmental review is necessary. The agency need only prepare and file a notice of exemption, citing the relevant statute or section of the CEQA Guidelines and including a brief statement of reasons to support the finding of exemption."[39] If no exemption applies, however, the agency "shall conduct an initial study to determine if the project may have a significant effect on the environment."[40] If the initial study indicates that there "is no substantial evidence that the project or any of its aspects may cause a significant effect[41] on the environment" then the "lead agency shall prepare a negative declaration"[42] describing its reasoning.[43]

"Significant effect" should not be confused with the "physical change in the environment" inquiry that occurs in the first tier of CEQA review. The question of whether or not an activity's effects are significant (or adverse) only need be addressed if CEQA's first tier, the preliminary review, finds that the activity constitutes a "project." Significant effect analysis plays no role in preliminary review.

The third and final tier of CEQA review involves the preparation of an Environmental Impact Report (EIR) "if the agency determines substantial

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environment. (Pub. Resources Code, § 21084(a).). These categorical exemptions are listed in the CEQA Guidelines. (14 CCR § 15300 et seq.)

[38] 14 CCR § 15061(b)(3)); *Muzzy Ranch*, 41 Cal.4th at 380.

[39] *Muzzy Ranch*, 41 Cal.4th at 380.

[40] 14 CCR § 15063(a). But, "[i]f the lead agency can determine that an EIR will clearly be required for the project, an initial study is not required but may still be desirable." (*Id.*).

[41] Substantial activity is defined it as "a substantial, or potentially substantial, adverse change in the environment. (Pub. Resources Code § 21068.)

[42] 14 CCR § 15063(b)(2).

[43] 14 CCR § 15070; *Muzzy Ranch*, 41 Cal.4th at 380-81.

evidence exists that an aspect of the project may cause a significant effect on the environment."[44] The EIR is a comprehensive informational document that is used to assess "the significant environmental effect of a project, identify possible ways to minimize the significant effects, and describe reasonable alternatives to the project."[45]

The process of CEQA review, therefore, largely consists of investigating whether or not an EIR is required. If at any point in the first and second tier of review it is discovered that an EIR is not necessary (because, e.g., there is no "project," an exemption applies, no significant effect, etc.), then CEQA review terminates before reaching the comprehensive process of preparing an EIR.

4.2.1. Scope of Review

The California Supreme Court found that "the Legislature intended [CEQA] to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."[46] Thus CEQA should be interpreted broadly, but also reasonably. The California Supreme Court also declared, "The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind."[47] This emphasizes CEQA's informational purpose and discounts CEQA reviews that do not serve that purpose. In reference to CEQA, the California Supreme Court has further cautioned "that rules regulating the protection of the environment must not be subverted into an

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[44] *Muzzy Ranch*, 41 Cal. 4th at 381.

[45] 14 CCR § 15121.

[46] *See*, *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 257.

[47] *See*, *Bozung v. Local Agency Formation Com.*, 13 Cal. 3d 263, 283.

instrument for the oppression and delay of social, economic, or recreational development and advancement."[48]

The scope of a CEQA review should include all activities that constitute "the whole of an action which has a potential for physical impact on the environment" as a single "project." Under CEQA, "'project' refers to the underlying activity and not the governmental approval process."[49] The review must include all foreseeable physical consequences that flow from those activities.[50] Activities and impacts that are unduly speculative need not be included.[51]

4.3. Applicability of CEQA to the Sale of Mining Assets

Before moving to our analysis, we address what appears to be a misunderstanding of the law in this case. Sierra Club's CEQA brief states that "approval under Section 851 triggers CEQA."[52] We disagree. The correct statement of law is, oddly, still given by Sierra Club in a parenthetical citation quoting *Natural Resources Defense Council, Inc. v. Arcata Nat. Corp.*: "'[the] term *"project" refers to the underlying activity and not the government approval process.*'"[53] Thus, an application for approval under Section 851 does not, as a rule, "trigger"

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[48] *See*, *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal. 3d 553, 576.

[49] 14 CCR § 15378(a).

[50] 14 CCR § 15064; *County Sanitation Dist. No. 2 v. County of Kern*, 127 Cal. App. 4th 1544, 1581.

[51] 14 CCR § 15064(d)(3); *County Sanitation Dist. No. 2*, 127 Cal. App. 4th at 1581 ("The 'reasonably foreseeable' test excludes physical changes that are speculative or not likely to occur.").

[52] *Id*. at 3.

[53] *Id*. at 3-4 (emphasis Sierra Club's).

CEQA. CEQA applies to transactions subject to Section 851 if, and only if, the transaction "may cause a direct or reasonably foreseeable indirect physical change in the environment." Accordingly, the potential "project" we review now is not our own Section 851 approval, but the "underlying activity" for which PacifiCorp seeks our Section 851 approval.

We first determine whether the activity requires a public agency's discretionary approval. Here, the proposed sale of assets does require the Commission's discretionary approval under Section 851. Next, does the proposed activity cause a direct or reasonably foreseeable indirect physical change to the environment?

Parties' disagreement as to what constitutes the "underlying activity" is subject to our review. As stated above, PacifiCorp contends that we should only be reviewing the sale of the Mining Assets and not the larger transaction of which it is a part. Sierra Club defines the "whole of the action" to also include the larger transaction with Bowie to close the Deer Creek Mine, the execution of a coal supply agreement, and the sale of Fossil Rock Fuels.

It is well established that the definition of a CEQA project must include "the whole of the action" that may cause a direct or reasonably foreseeable indirect physical change in the environment.[54] Essential to this rule is an element of causation; courts frequently focus on evaluating the "reasonably foreseeable consequences" of an activity.[55]

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[54] *See*, *California Unions for Reliable Energy v. Mojave Desert Air Quality Management District* (178 Cal. App. 4th 1225).

[55] *Id*. at 1244.

With that said, and based on the facts before us today, we find that the sale of Mining Assets in connection with the closure of the Deer Creek mine does not appear to be a project within the meaning of CEQA since the closure and transfer of assets is not an activity that may cause a direct or reasonably foreseeable indirect change to the environment. In looking at the whole of the action, we must review the entire transaction between Pacific Corp and Bowie Resources. However, in this instance, CEQA review would be premature for the following reasons: first, the Mining Assets are being used for the same purpose and in the same manner as they were used before the sale; and second, since there is no known development proposal at this time. Sierra Club's allegations that Bowie intends to use the Mining Assets, specifically the Trail Mountain assets and Fossil Rock leasing rights, in conjunction with the other assets purchased to increase coal extraction and export by rail through California are too remote at this point in time.[56] There is no development proposal and, as a result, CEQA review is premature because a lead agency cannot perform a meaningful analysis of potential impacts. "[W]here future development is unspecified and uncertain, no purpose can be served by requiring an EIR to engage in sheer speculation as to future environmental consequences."[57] In addition, "[i]t has long been recognized that premature attempts to evaluate effects that are uncertain to occur

[56] We note here that should Bowie seek to ship coal through the new terminal at the Port of Oakland, a rail line would be required. The Commission would then have jurisdiction over any rail crossings, including potential safety impacts at those crossings. At this time, however, this is simply speculation.

[57] *See*, *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 738.

or whose severity cannot reliably be measured is 'a needlessly wasteful drain of the public fisc.'"[58]

In light of our determination that CEQA does not apply to the sale of Mining Assets before us, we now review the proposed All-Party Settlement.

5. Summary of Proposed All-Party Settlement

5.1. Parties and Effective Date

The parties to the proposed Settlement agreement include all parties to the proceeding: PacifiCorp, Cal PA and the Sierra Club. If adopted by the Commission, the All-Party Settlement will be effective upon issuance of a Commission decision approving the All-Party Settlement.

5.2. Record of the Proceeding

Article I, of the All-Party Settlement asks the Commission to enter into the record the Parties' Testimony, supporting exhibits, and other documents the Parties deem relevant. It also recites stipulated facts that the Parties believe are relevant to resolving the issues raised in this proceeding including, but not limited to:

(a.) The transfer of the Mining Assets economically benefits PacifiCorp's customers, including those in California;

(b.) The likelihood of increased Utah coal exports transported through California has significantly decreased for the foreseeable future;

(c.) If increased coal exports through California were to occur, they would likely travel through large cities including Reno, Sacramento, Richmond, Stockton, Livermore, and Fremont; if the Oakland Terminal were to include coal as a commodity,

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[58] *See*, *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1061.

coal would likely be transported through Berkeley and Oakland as well;

(d.) If increased rail traffic were to occur as a result of increased coal exports, such increased rail traffic could result in increased risk of derailments, accidents, and other safety incidents;

(e.) Coal dust poses health and safety threats;

(f.) Coal shipments to and through California have significantly decreased since 2014;

(g.) The Fossil Rock Reserves are in PacifiCorp's Utah and Wyoming ratebase, but not in Idaho, California, or Oregon ratebase.

Parties further agree in subdivision (n.) that in light of PacifiCorp's decision to proceed with the sale of the Mining Assets without Commission authority, PacifiCorp shall contribute $30,000 to a community group in its California service territory as an appropriate remedy.

5.3. Settlement Terms

Article II contains the terms of the All-Party Settlement. It provides that, given the totality of the circumstances, the All-Party Settlement itself and the facts supporting a reduced risk of increased coal exports through California, the sale of the Mining Assets is in the public interest. Section 2.2 states that PacifiCorp has not entered into a CSA with a term of five or more years for the Hunter or Huntington plants since June 5, 2015. PacifiCorp agrees to submit a Tier 1 Advice Letter to the Commission as an information-only filing if PacifiCorp enters into any such agreement going forward and requires that advice letter to identify the ratemaking proceeding in which the new CSA will be addressed.

Sections 2.5 and 2.6 place certain obligations on PacifiCorp as part of its 2017 Integrated Resource Planning process and provides that PacifiCorp include a Regional Haze case that allows endogenous coal unit retirements and commits to evaluating this case among the same market price and greenhouse gas policy assumptions that will be used to evaluate other Regional Haze cases. Section 2.7 provides that PacifiCorp shareholders will make a $30,000 contribution to the Shasta Regional Community Foundation "in acknowledgement" of its having closed the sale prior to receiving Commission approval. Finally, parties agree that the record, as supplemented by the Settlement Agreement, is sufficient for the Commission to address the applicability of CEQA to the sale of the Mining Assets.

6. Commission Modification of All-Party Settlement

The Settlement Agreement proposes that PacifiCorp pay $30,000 to the Shasta Regional Community Foundation for closing the transaction prior to receiving Commission Approval. While commendable, such a donation is not the proper remedy for PacifiCorp's failure to comply with regulatory obligations. PacifiCorp knowingly chose to close the transaction prior to receiving our approval as required by Section 851.

PacifiCorp argues that it did everything in its power to comply with Section 851 by submitting its advice letter almost six months in advance of the contemplated closing date and by filing this Application promptly when the Advice Letter was rejected. The Commission, however, informed PacifiCorp that it would not make a determination prior to the closing date for the transaction. While we commend PacifiCorp for its early compliance in filing an advice letter, it must be emphasized that actual compliance with Section 851 requires receiving Commission approval before selling any assets subject to its requirements.

PacifiCorp's conduct in this matter shows great disrespect to the Commission's authority and to the regulatory process by presuming the outcome of a Commission proceeding even where the matter was contested by both Sierra Club and Cal PA. These facts should not suggest to any utility that they may proceed simply because they "tried" to obtain Commission approval. Indeed, it should give them pause that their proposal may not receive final approval. The Commission notified PacifiCorp that it would not receive approval prior to the scheduled contractual closing date but chose to close the transaction without Commission approval. Further, these actions harm public faith in the regulatory process as it gives rise to the appearance that utilities dictate the Commission's actions and that our approval is little more than a rubber stamp that can simply be obtained after-the-fact. Under these circumstances, PacifiCorp's decision to close the transaction prior to receiving Commission authority is tantamount to closing the transaction after the Commission had expressly denied its authority; it should be penalized accordingly.

Based on PacifiCorp's actions in this proceeding, the All-Party Settlement's proposal for an equitable remedy of a donation to a chosen charity is not reasonable in light of the whole record and as a result not in the public interest. Accordingly, pursuant to Rule 12.4(c), we reject the All-Party Settlement as written and propose that it be modified to eliminate Sections 1.2(n) and 2.7. The Commission will replace these sections with the imposition of a penalty as discussed below.

7. Discussion and Analysis of the All-Party Settlement With Proposed Modification

In order for the Commission to consider the proposed Settlement Agreement in this proceeding as being in the public interest,[59] the Commission must be convinced that the parties had a sound and thorough understanding of the underlying issues.

Pursuant to Rule 12.4, the Commission may reject a proposed settlement whenever it determines that the settlement is not in the public interest. Upon rejection, the Commission may propose alternative terms that are acceptable to the Commission while allowing the parties reasonable time to accept the terms or to request other relief.[60] Any party to a settlement agreement may elect not to accept modifications proposed by the Commission, and withdraw its request to adopt a proposed settlement agreement, or to seek other relief available.

Based on our review of all filed information and a careful review of the proposed settlement as modified with respect to the proposed donation of $30,000, we find the proposed settlement was offered by competent and adequately prepared parties able to make informed choices in the settlement process. Nothing in the settlement as modified violates any existing law or order of this Commission. Further, we agree with PacifiCorp that the sale of the Mining Assets and early closure of the Deer Creek Mine is in the public interest and benefits ratepayers since keeping these resources carries significant risk of cost increases in the future.[61] In addition, since the new long-term contract with

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[59] Rule 12.4.

[60] Rule 12.4(c).

[61] PacifiCorp Supplemental Direct Testimony of Cindy A. Crane at 22, 11-15.

Bowie to supply coal to the Huntington power plant is expected to reduce operating costs through lower sulfur content, while also including provisions that protect PacifiCorp against obligations to continue purchasing coal in the event of new laws, rules or regulations.[62] Based on the above factors and as required by Rule 12.1(d), we find the proposed settlement is reasonable in light of the whole record, consistent with the law, and in the public interest. We therefore adopt the settlement as modified.

8. Penalty

The purpose of a fine is to deter further violations by this perpetrator or others.[63] Effective deterrence creates an incentive for public utilities to avoid violations.[64] The Commission considers two general factors in setting fines; (1) the severity of the offense, and (2) the conduct of the utility.[65]

The severity of the offense includes several considerations including economic harm and unlawful benefits gained by the utility.[66] The harm may not be to the consumers but instead violations of compliance requirements that harm the integrity of the regulatory process.[67] Compliance with Commission directives is required by all California public utilities under Pub. Util. Code § 702.

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62 PacifiCorp Direct Testimony of Seth Schwartz at 30, 17-22.

63 *See*, D.98-12-075 at 53-54.

64 *Id*. at 54.

65 *Ibid*.

66 *Ibid*.

67 *Id*. at 55.

> Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees.

Such compliance is absolutely necessary to the proper functioning of the regulatory process.[68] Disregarding a statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity.

The conduct of the utility recognizes the public utility's role in preventing the violation, detecting the violation, and disclosing and rectifying the violation.[69] Prudent practice requires that all public utilities take reasonable steps to ensure compliance with Commission directives. The Commission will also consider the financial resources of the utility, the totality of the circumstances in furtherance of the public interest, and the role of precedent.[70]

We hold that, pursuant to Pub. Util. Code § 2107, PacifiCorp is subject to a penalty.[71] Financial restitution for a violation of law or Commission regulations

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[68] *Ibid*.

[69] *Id.* at 56.

[70] *Id.* at 59-61.

[71] Any public utility that violates or fails to comply with any provision of the Constitution of this state or of this part, or that fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500), nor more than fifty thousand dollars ($50,000) for each offense. (Pub. Util. Code § 2107.)

is made in the form of a penalty payable to the state.[72] We impose a fine of $30,000 on PacifiCorp's shareholders as a penalty for its violation of Section 851 pursuant to Pub. Util. Code § 2107. As readily acknowledged by all parties, PacifiCorp knowingly chose to close the transaction prior to receiving our approval as required by Section 851. Such blatant disregard for the Commission's authority and the Public Utilities Code must incur consequences. The imposition of a fine will help to deter future violations of Section 851 by the Applicant and others.

9. Retroactive Approval

The primary purpose of Section 851 is to require preclearance before a utility takes action.[73] The Commission has significantly limited the availability of retroactive Section 851 approval.[74] When the Commission grants only prospective authority of a transaction subject to Section 851 that has already occurred, "the transactions are void under Section 851 for the period of time prior to the effective date of this decision [and the utility] is at risk for any adverse consequences that may result from its having entered into the contracts without prior Commission authority."[75]

Here, PacifiCorp knowingly chose to close the transaction without prior approval. Its Advice Letter had been protested and it had received notice weeks earlier from Energy Division that it would not receive approval by its

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[72] Pub. Util. Code §2101 ("The commission shall see that the provisions of the Constitution and statutes of this State affecting public utilities … are enforced and obeyed, and that violations thereof are promptly prosecuted and penalties due the State therefor recovered and collected.").

[73] *Id.*

[74] D.00-09-035; D.04-03-038; D.03-05-033; D.03-06-069.

[75] D.04-03-038 at 20-21. *See also*, D.04-08-048 at 19-20.

contemplated closing date. To grant retroactive approval of such action would render Section 851 meaningless and encourage utilities to ignore its preclearance requirement when it inconveniences them. Accordingly, our approval is granted only prospectively and PacifiCorp is at risk for any adverse consequences that may result from its having closed the sale without prior Commission approval.

10. Motions

On September 18, 2015, PacifiCorp moved for confidential treatment of certain identified portions of its application.[76] On October 4, 2018, PacifiCorp moved for confidential treatment of certain identified rebuttal testimony.[77] On February 6, 2018, the parties to this proceeding filed the *Joint Motion for Confidential Treatment of Material Contained in the Exhibits to the Joint Motion of PacifiCorp, Sierra Club and the Office of Ratepayer Advocates for Adoption of Settlement Agreement; and Proposed Administrative Law Judge Ruling* (Joint Motion) seeking confidential treatment of material contained in the exhibits to the Joint Motion of PacifiCorp, Sierra Club, and the Office of Ratepayer Advocates for Adoption of Settlement Agreement and Proposed Ruling.[78]

The Joint Motion specifically identified the basis under which confidential treatment was authorized by GO 66-C. The marked and identified confidential portions of the testimony are commercially sensitive information. The disclosure of this information could harm PacifiCorp's ability to compete in the coal market, damage its ongoing business relationships, and result in disadvantage in other commercial transactions.

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[76] PacifiCorp complied with Rule 11.4 and 11.5 regarding motions for leave to file under seal.

[77] PacifiCorp complied with Rule 11.4 and new rules established by D.16-08-024.

[78] The joint motion complies with Rule 11.5.

D.14-10-033, as corrected by D.14-10-055 and D.15-01-024, and updated D.16-08-024 by set forth Confidentiality Protocols and a Confidentiality Matrix for information for use in Commission proceedings.

The confidential versions of the exhibits contain commercially sensitive material and include information that falls under "Confidential" categories in the Confidentiality Matrix. Therefore, the motion to file under seal is hereby granted and the confidential treatment of the exhibits is affirmed on the terms set forth in the Confidentiality Matrix.

11. Comments on Proposed Decision

The proposed decision of ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. PacifiCorp and Cal PA filed comments on September 4, 2018. Cal PA does not dispute the imposition of a penalty but maintains the proposed decision should be modified. Cal PA believes that the decision generally concludes that an equitable remedy is not consistent with the law or public interest.

The proposed decision makes no such unequivocal statement. Instead, the proposed decision states that based on whole record in this instance, the proposed equitable remedy is not in appropriate here because PacifiCorp's actions harm the integrity of the regulatory process itself. The decision has been modified as appropriate for clarification. PacifiCorp reiterates arguments previously considered with respect to the advice letter process that ignores the complexity of the transaction as a whole, which resulted in elevating the matter to a formal proceeding. The Commission makes no changes to the proposed decision in response to PacifiCorp's comments. However, if PacifiCorp also wishes to donate funds to rebuild the community center in Weed, the

Commission supports such a donation from shareholder funds. No reply comments were filed.

Assignment of Proceeding

Carla J. Peterman is the assigned Commissioner and Katherine Kwan MacDonald is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. On December 15, 2014, PacifiCorp submitted AL 513-E seeking approval from the Commission, in accordance with Pub. Util. Code § 851, to sell (1) the Central Warehouse and other remainder assets; (2) the Preparation Plant and related assets; and (3) the Trail Mountain Mine and related assets to Bowie.

2. On May 2, 2015, ED notified PacifiCorp that it would not issue a final resolution on AL 513-E prior to the contractual closing date.

3. On June 15, 2015, PacifiCorp d/b/a/ Pacific Power (PacifiCorp) sold the following: (1) the Central Warehouse and other remainder assets; (2) the Preparation Plant and related assets; and (3) the Trail Mountain Mine and related assets.

4. On June 24, 2015, the Commission rejected AL 513-E without prejudice.

5. On September 15, 2015, PacifiCorp filed the instant application seeking retroactive approval for the sale of (1) the Central Warehouse and other remainder assets; (2) the Preparation Plant and related assets; and (3) the Trail Mountain Mine and related assets.

6. PacifiCorp, Sierra Club and Cal PA held a settlement conference on December 8, 2016.

7. An All-Party Settlement was executed in December, 2016 and submitted for Commission approval on February 6, 2017.

8. The All-Party Settlement did not address whether the sale of the mining assets is subject to CEQA.

9. The parties to the All-Party Settlement include all parties, and are fairly reflective of the affected interests.

10. No term of the All-Party Settlement contravenes statutory provisions or prior Commission decisions.

11. The All-Party Settlement conveys to the Commission sufficient information to permit it to discharge its future regulatory obligations with respect to the parties and their interests.

12. The All-Party Settlement, as modified, is reasonable in light of the record, is consistent with law, and is in the public interest.

13. The purpose of a fine is to deter further violations and create an incentive for public utilities to avoid violations.

14. On February 6, 2018, the PacifiCorp, Sierra Club and Cal PA jointly moved for confidential treatment of identified material contained in the exhibits to the Joint Motion of PacifiCorp, Sierra Club, and the Office of Ratepayer Advocates for Adoption of Settlement Agreement and Proposed Ruling.

Conclusions of Law

1. CEQA requires an environmental review be conducted anywhere a proposed activity that is subject to public agency discretionary approval may cause a direct or reasonably foreseeable indirect physical change to the environment.

2. A project subject to CEQA is any activity that (1) requires a public agency's discretionary approval and (2) may cause a direct or reasonably foreseeable indirect physical change to the environment.

3. CEQA should be interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of statutory language.

4. The scope of a CEQA review should include all activities that constitute the whole of an action which has a potential for physical impact on the environment as a single project.

5. CEQA review should include all foreseeable physical consequences that flow from these activities. Review should not include activities and impacts that are unduly speculative.

6. CEQA applies to transactions subject to Section 851 if the transaction may cause a direct or reasonably foreseeable indirect physical change to the environment.

7. The proposed sale of mining assets requires the Commission's discretionary approval under Section 851.

8. Here, the whole of the action subject to review includes the entire transaction between PacifiCorp and Bowie.

9. CEQA review is premature at this time because there is no development proposal.

10. The Commission cannot perform meaningful analysis where future development is unspecified and uncertain.

11. The All-Party Settlement, as modified, is reasonable in light of the whole record, consistent with law, in the public interest and should be approved.

12. Compliance with Commission directives by all California public Utilities is required by Pub. Util. Code §702.

13. The Commission should consider the severity of the offense and the conduct of the utility when determining the amount of the penalty.

14. PacifiCorp should be subject to a penalty pursuant to Pub. Util. Code § 2107.

15. PacifiCorp should pay a penalty of $30,000 for knowingly choosing to close the transaction prior to receiving Commission approval.

16. The imposition of a fine should help deter future violations of Section 851 by PacifiCorp and others.

17. Granting retroactive approval of Pub. Util. § 851 would render it meaningless and encourage utilities to ignore its preclearance requirement when it inconveniences them.

18. We should grant PacifiCorp, Sierra Club and Cal PA's February 6, 2018 request for the confidential treatment of the confidential version of the Motion and All-Party Settlement.

O R D E R

IT IS ORDERED that:

1. The Joint Motion of PacifiCorp, Sierra Club and the Office of Rate Payer Advocates (All-Party Settlement), as modified by striking sections 1.2(n) and 2.7, is adopted. The All-Party Settlement is attached as Appendix A to this decision.

2. PacifiCorp must pay a penalty of $30,000 payable by check or money order to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, San Francisco, California 94102 within 30 days of the effective date of this order. Write on the face of the check or money order "For deposit to the General Fund per Decision _____."

3. PacifiCorp, Sierra Club and the Office of Rate Payer Advocates joint request for the admittance of the following documents is granted:

a. The Oakland Ordinance, Settlement Agreement Attachment A;

b. The Oakland Resolution, Settlement Agreement Attachment B;

c. The Sierra Club Response to PacifiCorp Data Request 8, dated November 3, 2016, Settlement Agreement, Attachment C;

d. The Sierra Club Response to PacifiCorp Data Request 1, Question 5, and Attachment "PacifiCorp 5" (Prepared Testimony of Tom Sanzillo submitted to the City of Oakland), dated February 26, 2016, Settlement Agreement, Attachment D;

e. PacifiCorp's Response to Cal PA Data Request 5 dated August 11, 2016, Settlement Agreement, Attachment E;

f. The testimony of the Parties served in this proceeding, Settlement Agreement, Attachments F through N.

4. PacifiCorp, Sierra Club and the Office of Ratepayer Advocates' joint motion for Confidential Treatment of the following exhibits is granted:

a. Exhibit PAC/100

b. Exhibit PAC/101

c. Exhibit PAC/102

d. Exhibit PAC/103

e. Exhibit PAC/200

f. Exhibit PAC/202

g. Exhibit PAC/203

h. Exhibit PAC/204

i. Exhibit PAC/300

j. Exhibit PAC/311

k. Direct Testimony of Jeremy I. Fisher, Ph.D on Behalf of Sierra Club

l. Exhibit JIF-2

m. Exhibit JIF-5

n. Exhibit JIF-6

o. Exhibit JIF-7

5. The confidential information shall remain under seal for three years from the effective date of today's decision pursuant to the applicable terms set forth in the Confidentiality Matrix attached to Decision (D.) 14-10-033, as corrected by D.14-10-055 and D.15-01-024. During this three-year period, the confidential information shall not be made accessible or disclosed to persons other than the Commission and its staff except on further Commission order or Administrative Law Judge ruling. If any of the parties believes the information that today's decision places under seal should be protected beyond three years, the applicant may state by motion the justification for further withholding the information from public inspection. The motion must explain with specificity why the information still needs protection in light of the passage of time involved, and the motion must be filed at least 30 days before expiration of the protection under today's decision.

6. The preliminary determination made in Resolution ALJ 176-3364 and confirmed in the Scoping Memo and Joint Ruling of the Assigned Commissioner and Administrative Law Judge of the need for hearings is changed to hearing is not necessary.

7. Application 15-09-007 is closed.

This order is effective today.

Dated _____, at San Francisco, California.